

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT NELSON,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:05-CV-551-A
	§	
COLONIAL SAVINGS, F.A.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

On October 5, 2006, defendant, Colonial Savings, F.A. ("Colonial"), moved for summary judgment on all claims asserted by plaintiff, Robert Nelson ("Nelson"), in this suit. Having considered the motion, the response, the reply,¹ the summary-judgment evidence, and the applicable legal authorities, the court concludes that the motion should be granted as stated below.

I.

Plaintiff's Claims

In this lawsuit, Nelson contends that Colonial terminated his employment in violation of (1) the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-213; (2) the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654; and (3) the Age Discrimination in Employment Act ("ADEA").²

¹As part of its reply, Colonial has objected to some of Nelson's summary-judgment evidence. The court has taken these objections into account in deciding what weight to give the complained of evidence.

²Colonial had understood Nelson also to assert a claim for failure to accommodate his purported disability. Because Nelson has clarified that he is not asserting this claim, the court does not address it. See Pl.'s Resp. to Def.'s Mot. for Summ. J. at 25, § D.

II.

The Motion for Summary Judgment

Colonial maintains that Nelson cannot establish a prima-facie case of any of his claims. Even if there were evidence establishing a prima-facie case on his claims, Colonial contends that it had a legitimate, non-discriminatory and non-retaliatory reason for terminating Nelson's employment.

III.

Facts

A. Relevant Undisputed Facts

Colonial, a financial services and lending institution, hired Nelson in February of 1998 to work in the Home Loan Center ("HLC") as a loan officer. In that position, Nelson was responsible for mortgage retention, which involves attempting to convince current Colonial customers to refinance their mortgages with Colonial and not a competitor.

At the time of his hire, Nelson was 65 years old and used at least one cane to walk. In 2000, Nelson was diagnosed with Myasthenia Gravis, a neuromuscular disease that caused weakness in his legs. During his employment with Colonial, Nelson eventually needed two canes to walk, but, with them, he could walk at almost a regular pace. Due, however, to complications from the disease in 2003, Nelson needed two days off every six weeks for treatment, as well as a later start time each day due to the side-effects of his medications. Colonial granted each of

these accommodations. In approximately the spring of 2004, Nelson asked someone in Colonial's Human Resources for the forms to request leave under FLMA for the days on which he received treatments so that he would no longer have to use sick and vacation days for that time off. In June of 2004, he submitted his medical certification to Colonial to qualify for and in preparation for FMLA leave.

In early 2003, six to seven of the HLC loan officers were transferred to retail loan officer positions where they were required to generate new loans and make in-person visits with potential customers. The other six to seven HLC loan officers, including Nelson, continued to perform as they had before but under the new title "retention loan officer."

Also in 2003, due to slowing business, Colonial was forced to lay off 49 employees, including one of the HLC retention loan officers. Some of these employees were younger than Nelson. When Colonial's business continued downward into 2004, and in an attempt to save expenses without having to lay off additional employees, Colonial changed the retention loan officers' hours from a full time, 40-hour-work week to a 30-hour-work week. Apparently this cost-cutting measure proved ineffective as, between January 1, 2004, and August 1, 2004, Colonial laid off another 35 employees, all of whom were younger than 40, and not, to Colonial's knowledge, disabled. Also, of those 35 employees, 33 had not requested leave under FMLA.

Business conditions required Colonial to lay off even more employees in August of 2004. As part of this round of lay offs, Colonial's Vice-President of Production, Mark Dennis, directed Nelson's supervisor to reduce the number of employees at the HLC. On July 28, 2004, Nelson was handed a letter stating that, due to a reduction in force, he was being terminated effective August 31, 2004.

B. Relevant Disputed Facts

According to Colonial, Nelson was fired, because, among the retention loan officers, he had the lowest amount of loans closed per hours worked. Nelson alleges that, upon being informed of his termination, he asked Berry Roberson ("Roberson"), the manager of HLC, if he could transfer to a retail loan officer position. In response, Roberson purportedly told him: "You wouldn't be comfortable going outside." Roberson denies ever making such a statement.

IV.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson, 477 U.S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or

more essential elements of the non-moving party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994). An issue is material only if its resolution could affect the outcome of the action. Anderson, 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir. 1984).

V.

Analysis

To establish a prima-facie case of retaliation under FMLA as alleged by Nelson here, see Pl.'s Resp. to Def.'s Mot. for Summ. J. at 11-12, Nelson must show that: (1) he is protected under FMLA; (2) he suffered an adverse employment decision; and (3) the

adverse decision was made because of his request for leave under FMLA. See Bocalbos v. Nat'l W. Life Ins. Co., 162 F.3d 379, 383 (5th Cir. 1998).³ For a prima-facie case under the ADEA, he must show that: (1) he was fired or demoted; (2) he was qualified for the position in question; (3) he is a member a protected class (i.e. over the age of forty); and (4) he was replaced by someone outside the protected class or younger. See, e.g., Evans v. City of Houston, 246 F.3d 344, 350 (5th Cir. 2001); Bennett v. Total Minatome Corp., 138 F.3d 1053, 1060 (5th Cir. 1998). Finally, a prima-facie case under the ADA requires Nelson to show that: (1) he has a disability; (2) he is a qualified individual for the job in question; and (3) an adverse employment decision was made because of her disability. See Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1024 (5th Cir. 1999). Even if Nelson makes out prima-facie cases on all his claims, summary judgment for Colonial may nonetheless still be proper under the evidentiary burden-shifting framework of McDonnell Douglas Corp. v. Greene, 411 U.S. 792 (1973), as modified by Desert Palace, Inc. v. Costa, 530 U.S. 90 (2003). See Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004). Under this framework, after the plaintiff establishes a prima-facie case, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for its actions. Id. If the defendant meets this burden, then

³A plaintiff may also meet the third element of a prima-facie case by showing that he was treated less favorably than an employee who had not requested leave under FMLA. Bocalbos, 162 F.3d at 383. Nelson does not appear to make this assertion and, at any rate, there is no evidence to support it even if he had.

plaintiff must offer evidence sufficient to create an issue of material fact "'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motive[s] alternative).'" Id. (quoting Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp.2d 854, 865 (N.D.N.C. 2003)).⁴

The court has serious doubts as to whether Nelson has shown a prima-facie case as to any of his claims. Even assuming, however, that he has, the court is amply satisfied that Colonial is entitled to judgment as a matter of law, because it has adduced evidence of a legitimate non-discriminatory reason for terminating Nelson's employment. Rachid, 376 F.3d at 312. Simply put, the summary-judgment record reflects that Nelson was merely one of many employees laid off due to a downturn in Colonial's business. Indeed, Nelson readily concedes this:

Colonial claims that Nelson's termination was due to the fact that Colonial's mortgage loan business had declined to the point where a loan officer needed to be laid off, and that Nelson was the lowest-producing loan officer . . . Colonial has articulated a legitimate, non-discriminatory reason for Nelson's termination. Thus, Nelson must now raise a genuine issue of material fact regarding the falsity of Colonial's proffered reason, or show that even if true, the proffered is but one reason, the other being discriminatory animus.

See Pl.'s Resp. to Def.'s Mot. for Summ. J. at 17.

⁴The modified burden-shifting framework of McDonnell-Douglas applies to all of Nelson's claims. See, e.g., Rachid, 376 F.3d at 312 (applying it to ADEA claim); Bocalbos, 162 F.3d at 383 (applying it to FMLA claim); Raytheon Co. v. Hernandez, 540 U.S. 44, 50-52 (2003) (applying it to ADA claim).

Having correctly articulated his burden of proof at this juncture, Nelson fails to carry it. Rather, he merely urges that Colonial should have used different business factors than the one used, i.e. loans closed per hours worked, in choosing which employee to fire. This assertion is insufficient to defeat Colonial's motion for summary judgment. As the Fifth Circuit has repeatedly held, "anti-discrimination laws 'are not vehicles for judicial second-guessing of business decisions.'" See, e.g., Mato v. Baldauf, 267 F.3d 444, 452 (5th Cir. 2001) (quoting Deines v. Texas Dep't of Protective & Regulatory Serv., 164 F.3d 277, 281 (5th Cir. 1999)).

Aside from nitpicking at the business reason why he was fired, the only other purported evidence possibly relied on by Nelson to show discriminatory intent on Colonial's part is the alleged remark made by Roberson that Nelson "wouldn't be comfortable going outside." Even if Roberson made this remark, he said it after Nelson was fired and in response to Nelson's informal request for an entirely different job as a retail loan officer at Colonial. For a remark to be probative of discrimination, "it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that [the protected characteristic] was an impermissible factor in the decision to terminate the employee." E.E.O.C. v. Texas Instruments Inc., 100 F.3d 1173, 1181 (5th Cir. 1996). Neither stray nor vague remarks are sufficient. Id.; Guthrie v. Tifco Industries, 941 F.2d 374, 378-79 (5th Cir.

1991). Again assuming it was even said, the complained-about remark has no obvious connection to Nelson's age, alleged disability, unfulfilled intent to request leave under FMLA, or Colonial's decision to lay him off. Among a myriad of possibilities, it could very well reflect Roberson's belief that Nelson's personality is not well suited for a job requiring such direct and in-person interaction with people. In short, this stray remark is much too vague to constitute competent summary-judgment evidence of discriminatory intent. Summary judgment for Colonial is proper.

VI.

Order

For the reasons discussed above, the court concludes that Colonial's motion for summary judgment should be granted. Therefore,

The court ORDERS that all of Nelson's claims and causes of action against Colonial in the above-captioned action be, and are hereby, dismissed with prejudice.

SIGNED November 29, 2006.

/s/ John McBryde
JOHN McBRYDE
United States District Judge